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Issue Date: 01 June 2007

In the Matter of:

L.W., JR.[1]
Claimant

Case No.: 2007 LDA 3
OWCP No: 02-147995

v.

SERVICE EMPLOYEES INTERNATIONAL, INC./
INSURANCE CO. OF THE STATE OF PENN.
Employer/Insurer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party in Interest

Appearances: Mr. Ralph R. Lorberbaum, Attorney
For the Claimant

Mr. Grover E. Asmus, Attorney
For the Employer

Before: Richard T. Stansell-Gamm
Administrative Law Judge

DECISION AND ORDER - AWARD OF TEMPORARY TOTAL, PERMANENT TOTAL, AND PERMANENT PARTIAL DISABILITY COMPENSATION, AND AWARD OF MEDICAL BENEFITS

This case involves a claim filed by Mr. L.W. for disability compensation and medical benefits under Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 to 950, as amended ("Act"), and as extended by the Defense Base Act, 42 U.S.C. § 1651, and the War Hazards Compensation Act, 42 U.S.C. § 1701, for injuries Mr. W. allegedly suffered while an employee of Service Employees International, Inc. ("SEI").

[1]Chief Administrative Law Judge John Vittone has directed that I substitute initials for the name of the Claimant. Any comments or concerns regarding this mandated practice should be directed to Chief Administrative Law Judge John Vittone, 800 K Street, Suite 400N, Washington, D.C. 20001.

On June 13, 2006, through counsel, Mr. W. filed a disability compensation claim for a back injury he suffered in Afghanistan on March 10, 2006. In his September 2006 pre-hearing statement, Mr. W. sought disability compensation and medical benefits for the accidental injury. The District Director forwarded the pre-hearing report to the Office of Administrative Law Judges on October 5, 2006. Pursuant to a Notice of Hearing, dated November 2, 2006 (ALJ I),[2] I conducted a hearing on January 25, 2007 in Savannah, Georgia, attended by Mr. W., Mr. Lorberbaum, and Mr. Asmus.

Evidentiary Discussion

At the hearing, I kept the record open to give the Employer an opportunity to obtain a medical evaluation of Mr. W.'s condition. On April 4, 2007, I received Dr. Mark's March 26, 2007 medical evaluation and now admit the report and his CV as EX 15.

On May 22, 2007, I received a Motion from Employer's counsel to reopen the record to permit the admission of Mr. W.'s payroll summary from Malphrus, marked EX 17, covering the pay periods from January 1, 2007 through May 13, 2007. According to counsel, the additional information more completely documents Mr. W.'s average weekly wage at Malphrus. Rather than the $808 that he earned during the first week, over the past five months, considering his usual amount of overtime, Mr. W. earned $1,060 a week.

On May 25, 2007, Claimant's counsel objected to reopening the record. Counsel observed that the record was kept open post-hearing through March 2007 for submission of an additional medical report. During that period, Employer's counsel had ample opportunity to also submit additional wage information. Since the record has since closed, counsel asks that I deny the motion and not admit the Malphrus wage information.

At the January 25, 2007 hearing, Mr. W. indicated that he had just started working as a truck driver for Malphrus at $16 an hour. The only wage data available at that time covered his first full week in January when he worked about 47 hours as a driver for Malphrus and earned $808. Although Mr. W. anticipated working more than 47 hours a week, no further wage data was available. The new evidence submitted by the Employer provides additional wage information from Malphrus that was obviously unavailable at the time of the hearing. While the Claimant's generalized objection is understandable, this relevant information might eventually come into the record through either reconsideration or modification. I also note the Claimant does not contest the accuracy of the Malphrus payroll summary. As a result, to permit a more efficient and accurate adjudication, I overrule the Claimant's objection to new wage information and admit the Malphrus pay roll summary as EX 17.

Accordingly, my decision in this case is based on the testimony presented at the hearing and all the documents admitted into evidence: CX 1 to CX 24, EX 1 to EX 13, EX 15, and EX 17.

[2]The following notations appear in this decision to identify specific evidence and other documents: ALJ – Administrative Law Judge exhibit, CX – Claimant exhibit, EX – Employer exhibit, and TR – Transcript of hearing.

Issues

1. Whether Mr. W. suffered an injury on March 10, 2006 arising out of and during the course of his employment with Service Employees International.

2. If Mr. W. suffered an work-related injury, the nature and extent of any associated disability.

3. Average weekly wage and post-injury wage-earning capacity.

4. Disability compensation

Parties' Positions

Claimant[3]

In the early morning of March 10, 2006, after working for the Employer for over two years, as he was awaiting transportation at Bagrahm Air Force Base, Afghanistan, to the United States for vacation, Mr. W. fell out of a cot while sleeping. At that time, he noticed a tingling sensation in his right hip and returned to sleep. When he awoke in the morning, Mr. W.'s feet were numb and he sought treatment from local medics. When the numbness continued in the United States, Mr. W. visited his family physician who referred him to a specialist. In turn, the neurologist conducted an MRI. Prior to receiving the MRI results, Mr. W. returned to work in Afghanistan even though the foot numbness persisted. When the MRI results arrived in Afghanistan showing significant thoracic spinal compression at T3 and T5, Mr. W. returned to the United States on May 1, 2006 for spinal decompression surgery. Although surgery produced some improvement, residual difficulties precluded Mr. W.'s return to work for the Employer in Afghanistan. Instead, after a period of physical therapy, Mr. W. started work as fuel truck driver on December 21, 2006 for a local company, earning $16 an hour.

Through his testimony that he suffered no back problems prior to March 10, 2006, fell out of a cot at Bagrahm AFB in Afghanistan on March 10, 2006, and his presentation to the medics the same day for foot numbness, Mr. W. has established that he suffered a physical harm which could have been caused by an accident at work. Having established a *prima facie* case of an injury, Mr. W. has invoked the presumption under Section 20(a) that his disabling back condition was related to his employment with SEI. Dr. Mark's opinion concerning causation does not rise to the level of sufficient substantial evidence to rebut the Section 20(a) presumption. To the extent the presumption has been rebutted, Dr. Horn's more probative medical opinion as a treating physician establishes that Mr. W.'s fall precipitated the symptoms relating to his pre-existing back condition.

Based on Dr. Horn's treatment record and rehabilitation assessment, Mr. W. was unable to return to work full time from May 1, 2006 until January 2, 2007. Further, the jobs presented in the labor market survey either did not specify a salary, were speculative, paid no more than the job Mr. W. obtained, or were not available until January 2007.

[3]TR, p.21-28; Closing Brief (May 1, 2007).

Since Mr. W.'s previous work in the United States was different than his job in Afghanistan and he worked almost two years in Afghanistan before his injury, his average weekly wage should be determined based solely on his pay in Afghanistan. That average weekly wage is $1,512.24.

In summary, Mr. W. is entitled to temporary total disability compensation from May 1, 2006 to November 6, 2006 when he reached maximum medical improvement, based on an average weekly wage of $1,512.24. Next, from November 7, 2006 to January 2, 2007, Mr. W. is entitled to permanent total disability compensation based on an average weekly wage of $1,512.24. After January 2, 2007, due to a loss of wage earning capacity, Mr. W. is entitled to permanent partial disability compensation under Section 8(c)(21) based on the difference between his pre-injury average weekly wage of $1,512.24 and his post-injury average weekly wage of $808.00. Finally, Mr. W. seeks medical treatment benefits and attorney fees.

Employer[4]

Mr. W. had a pre-existing condition, degenerative spinal stenosis, which may have become symptomatic at any time. While some question remains about whether Mr. W. fell out of his cot in the early morning of March 10, 2006 or that his foot numbness arose due to a fall, his treating physician, Dr. Horn, opined that Mr. W.'s degenerative back condition could have become symptomatic with or without any minor trauma. Another physician, Dr. Mark, doubted that a fall out of a cot could have caused Mr. W.'s pre-existing back condition to become symptomatic. Based on these circumstances, the Employer asserts no accident or injury occurred on March 10, 2006. Instead, Mr. W.'s back problem "fortuitously became manifest" while Mr. W. was in Afghanistan without any particular instigating event or accidental injury.

If a determination is made that Mr. W. suffered an injury in Afghanistan, he may be entitled to an award of temporary total disability benefits from May 1, 2006, when Mr. W. last left Afghanistan to December 21, 2006 when he returned to work as a fuel truck driver for a local construction company.

Regarding the amount of Mr. W.'s disability compensation, the Employer maintains that calculation of the applicable average weekly wage under Section 10(c) should take into account not only his extraordinarily high pay in Afghanistan while working seven days a week for 12 hours a day, and its temporary nature, but also his previous earnings stateside, as well as his present earning capacity in his new employment. Due to the special circumstances of Mr. W.'s case, the appropriate average weekly wage ranges from $652.40 to $759.00 based on averaging earnings over the course of five or four years.

Concerning permanent partial disability compensation under Section 8(c)(21), Mr. W.'s present average weekly is about $1,060, which exceeds his pre-injury average weekly wage such that he has not suffered a loss of earning capacity. Additionally, even if a higher average weekly wage based solely on his employment in Afghanistan were used, the labor market survey establishes suitable jobs for Mr. W. with a range of pay that also represents no long term loss of

[4]TR, p. 13-21, 28; Closing Brief (May 3, 2007).

earning capacity. Considering his college education and work experience, Mr. W. should be able to obtain re-employment in the United States that rises to the level of his overseas earnings level.

In summary, Mr. W.'s back problem was a pre-existing condition that was not caused or aggravated by a work-related accident. As result, the Employer is not liable for any disability compensation and medical treatment associated with Mr. W.'s back condition. Alternatively, even if Mr. W. suffered a work-related injury, the appropriate average weekly wage should be based on average earnings for five or four years. Further, upon his return to the workforce on December 21, 2006, Mr. W. did not suffer a permanent loss of earning capacity. Consequently, Mr. W. is not entitled to permanent partial disability compensation.

Summary of Evidence

While I have read and considered all the evidence presented, I will only summarize below the information potentially relevant in addressing the issues.

Testimony of Mr. L.W., Jr.
(TR, p. 42 - 141)

[Direct examination] After working nine years as a truck driver in the Savannah, Georgia, Mr. W. started his employment with SEI on January 19, 2004 in Kabul, Afghanistan. His SEI job title was POL (petroleum, oil, and lubrication) driver. His primary duty on a daily basis was the delivery of fuel. Mr. W. worked 12 hours a day, seven days a week. As part of his delivery duties, Mr. W. had to climb onto the top of the fuel trucks and move and lift heavy hoses. At other times, Mr. W. had to strap down cargo. Afghanistan was a war zone and his job involved high tension, stress, and required caution. While driving in Afghanistan, Mr. W. wore a helmet and Kevlar vest and had an armed escort. The roads were not well maintained and contained many potholes. Mr. W. also participated in attack drills which required him to run to bunkers. His job as a driver in Georgia did not have similar characteristics or requirements.

During the course of a year employment with SEI, Mr. W. was entitled to two 14 day periods of R & R (rest and relaxation) at partial pay. At the end of the year, he received an additional 3 weeks of R& R at full pay. Normally, Mr. W. returned to his home in Savannah for R & R.

On March 9, 2006, in order to catch a charter flight back to Savannah for R & R, Mr. W. was at Bagrahm Air Force Base, near Kabul, Afghanistan. That night, he went to sleep on an Army cot in a large transition tent. In the early morning of March 10, 2006, Mr. W. rolled off the cot, which was about three feet to 18 inches above the ground. The fall woke Mr. W. up and he felt like he had hit a funny bone in his hip and leg area. The sensation was sort of a numbness. After about 5 minutes the sensation went away and Mr. W. went back to sleep.

Upon awaking in the morning on March 10, 2006, Mr. W.'s feet were numb. It felt like he had been give medication to dull pain. He had never experienced that sensation in his feet. Due to the numbness, Mr. W. went to the medics at the air base and told him about his problem and the fall from the cot. Upon examination, the medic indicated Mr. W probably pinched a

nerve. The medic prescribed Flexiril and suggested that Mr. W. see a doctor when he got home. The medication did not resolve the numbness. A few days later, Mr. W. flew back to the United States.

Once in Savannah, Mr. W. went to Dr. Paul Bradley. Dr. Bradley took a blood sample to rule out a vitamin deficiency and referred Mr. W. to a neurologist, Dr. Bodziner. Dr. Bodziner conducted a neurological examination and ordered a full body MRI.

Prior receiving the MRI result, Mr. W. returned to Afghanistan in the first part of April 2006. The numbness in Mr. W.'s feet persisted and seemed to be worsening. In addition, pressure developed in his buttocks and back.

When Mr. W. received the MRI result indicating spinal compression, he showed it to his supervisor in Kabul who referred him to the medical supervisor. The medical supervisor approved medical leave so Mr. W. could return to the United States.

Mr. W. returned to the United States on May 5, 2006. His last pay from SEI covered his work through the end of April 2006.

Upon his return, Mr. W. went to Dr. Horn who explained the results of the MRI and ordered a CT scan and myelogram. Eventually, Dr. Horn recommended surgery to relieve pressure on the spine. Due to difficulties with the company insurance carrier, the surgery was delayed. The surgery was performed on July 25, 2006. Although his low back and buttocks stiffness is gone, Mr. W. continues to have numbness in his feet and experiences a continuous dull grabbing or restricted sensation in his back.

Mr. W. had not injured his back previously to March 10, 2006 and did not do anything in Savannah after April 2006 to injure or aggravate his back. Prior to his return to the United States in March 2006, no physician had ever recommended back surgery.

Mr. W. started physical therapy, but when the company wouldn't pay the bill, he stopped going.

Based on his past experience with SEI, Mr. W. believes any job that might be offered in Afghanistan would be hazardous. Due to his injury, Mr. W. is no longer capable of driving a truck for SEI in Afghanistan. In particular, he can no longer run, lift heavy hoses, or endure working 12 hours a day, seven days a week.

Since December 21, 2006, Mr. W. has been working for Malphrus Construction ("Malphrus") as a fuel truck driver. He trained on December 21 and 22, and then returned on January 2, 2007 after the holidays to work full time. Mr. W. works about ten hours a day five to six days a week. Since he has a helper, Mr. W. is not required to lift any heavy hoses. He is working about 47 hours a week at $16 an hour.

[Cross examination] Mr. W. only had to wear his helmet and vest when he was driving outside the base compounds. Many civilians, including administrative personnel, construction

workers and warehouseman worked inside the base area and did not have to wear protective gear. However, even those jobs required some dexterity in the event of an attack.

Although he had not previously suffered a back injury, in the past Mr. W. saw a doctor about numbness in his neck that radiated down into his arm. He doesn't recall the physician telling him that there was something wrong with his neck. In his pre-employment questionnaire for SEI, Mr. W. indicated that he had never experienced neck or back pain.

At Bagrahm, Mr. W. was sleeping in the transition tent with several other individuals. He was on a folding cot. When Mr. W. sat on the cot, his feet touched the floor. The cot was lower than a normal bed. Because he felt a tingling in his right hip when he awoke, Mr. W. assumes he landed on his right side when he fell on the wood floor at about 2:00 a.m. Other than the tingling sensation, Mr. W. did not feel numbness anywhere else. He didn't talk to anyone then and went back to sleep in about five minutes. When he awoke at 8:00 a.m., his feet were numb with more numbness in the right foot. After Mr. W. took a shower and the numbness persisted, he went to see a medic. He informed the medic about falling out of the cot and the numbness in his feet. After a physical examination, the medic concluded that he may have pinched a nerve and suggested that he see a doctor upon his return to the United States. Mr. W. doesn't know why the medic didn't record his statement about falling out of the cot. Mr. W. did not fill out an accident report about his fall.

After waiting a few days for transportation, Mr. W. returned to the United States on March 13, 2005. When he first saw Dr. Bradley, Mr. W. told him about falling out of the cot. Mr. W. also told Dr. Horn about the incident and believes the referral notes also contained that information.

Since his surgery, the low back and buttock pain is gone. Although somewhat improved, the numbness in his feet remains.

The fuel truck Mr. W. presently drives is a body truck, not a combination vehicle. Mr. W. has a commercial driver's license and hazardous materials certification. Mr. W. has worked 40 to 47 hours a week at Malphrus. If he worked a six day week, the maximum hours would be 55. Although Mr. W. has not yet worked 55 hours a week at the company, he anticipates that he will at some time. He receives time and a half pay for overtime after 40 hours.

Mr. W. graduated from college with honors, majoring in political science. After attending law school for one year, Mr. W. married and dropped his law studies. He started working at an engineering graphics company as a warehouse clerk. In that capacity, he received raw materials and distributed them to the production line. He also shipped the final product. After seven years, Mr. W. left the company to move to Savannah because his wife was selected as the county's human resource director. In Savannah, Mr. W. became a warehouse foreman for a construction company. In that capacity, Mr. W. ensured building materials were efficiently released to job sites. After a year and a half, Mr. W. moved to an expanding paper mill company as a warehouse foreman. He worked for three years at the paper mill. In 1991, Mr. W. moved on to Montgomery Ward and worked another three years as a warehouse manager and sales clerk. In 1994, seeking a more stable income, Mr. W. became self-employed in commercial

delivery service for stores. However, by 2003, Mr. W. was transporting shipping containers from the port.

Although Mr. W. is physically capable of driving a truck, he is not driving any long distances.

When Mr. W. signed his employment contract with SEI, he believed they had a ten year project. At the same time, he was aware it was in a war zone and the war might not last forever.

In addition to the seven days a week, 12 hours a day schedule, Mr. W.'s salary in Afghanistan received an "uplift" due to danger pay, foreign service pay, and signing bonus. At one time, his base pay was $2,700 a month. Through the uplift factors, that monthly figure increased to about $6,600. However, during the R & R periods, he only received his base pay.

After meeting with Mr. Greenstein in December 2006 and receiving various job descriptions from him, Mr. W. expressed his concern that some of the overseas jobs were with the holding company for SEI. In regards to the jobs in the Savannah areas, Mr. W. called two of the contact individuals. However, the pay was too low.

[ALJ examination] After Mr. W. returned to Afghanistan in April 2006, he was able to drive the fuel truck and lift hoses. His condition did not stop him from doing his job. When he received the MRI report, it showed a disc compression. The letter recommended that he seek further medical treatment. Mr. W.'s present concern about returning to Afghanistan is the loss of dexterity and an inability to lift heavy items. Although after his fall and before the surgery, Mr. W. was able to lift hoses, his back condition was getting worse. He felt continued pressure in his back and buttocks.

The Savannah jobs referred to him offered pay much lower that the amount he currently earns at Malphrus.

[Redirect examination] When he returned to Afghanistan in April 2006, Mr. W. had difficulty doing his work. In addition to his dexterity concern, the rough roads in Afghanistan would also be bad for his back.

Mr. W. was concerned about contacting the holding company for SEI due to his pending disability claim. When he called one company representative, she indicated they could not deal with him until his litigation was resolved.

Income Tax Returns
(CX 2 and EX 10)

In his individual tax return for 2001, Mr. W. reported an adjusted gross income of $3,288, which included self-employment business income of $2,350. In a joint return for 2002, Mr. W. reported income of $20,971 and a business profit of $13,785. The 2003 joint returned showed an income of $24,328 and business profit of $5,054. In 2004, Mr. W.'s joint return income was

$93,935; of that amount, $75,245 was tax-exempt as overseas income. In his 2005 joint return, Mr. W. reported an income of $87,172; with $73,214 in tax-exempt overseas income.

Service Employees International Employment Record and Wages
(CX 3, CX 6, EX 3, EX 9, and EX 11)

In January 2004, Mr. W.'s employment with SEI as a truck driver in Afghanistan was approved at the base weekly pay of $2,700. The employment agreement indicated that Mr. W.'s work in Afghanistan was "in support of the U.S. Army's Area of Operations" under a government contract. The agreement also indicated that the employment relationship was "at will" and there was "no guarantee of continued employment." Nevertheless, the "duration of your assignment is anticipated to be approximately 12 months," subject to any extensions. Every four months, Mr. W. would receive 10 consecutive days of leave, paid at the rate of 80 hours, "straight time (no uplifts)."

On January 4, 2004, Mr. W. received training on how to respond to nuclear, chemical, and biological attack. He was also trained in threat environment protection, alarms, and signals. He received protective gear, including a gas mask and kit bag.

On January 18, 2004, Mr. W. departed the United States for Afghanistan. He arrived in Afghanistan the next day.

Between March 2005 and June 2006, Mr. W. earned a total of $95,234 as a Service Employees International employee. For the week of January 28, 2006 to February 3, 2006, Mr. W.'s base weekly rate was $2,700. He also earned $632 in hazardous duty pay (25%), $632 in area differential (25%), and $125 as an overseas allowance (5%). Mr. W.'s "in-country" housing and transportation were provided by the employer. Mr. W.'s gross pay from January 18, 2004 (his start date) through December 31, 2004 was $75,245. Between January 1 to November 26, 2005, Mr. W. earned $73,214.[5] Between January 1 and May 27, 2006, Mr. W. earned another $31,886.

SEI Medical Records
(CX 5, CX 7, EX 2, and EX 4)

On a December 30, 2003 medical questionnaire, Mr. W. indicated that he had never suffered a back injury. He had no back pain or weakness in his extremities. A physical examination revealed that his back was within normal limits and he was qualified for work without any significant medical problems.

On March 10, 2006, Mr. W. presented at the Bagrahm Air Field Clinic with acute right leg pain. Mr. W. indicated that when he woke up in the morning and sat on his cot, his right leg was painful and tingling. Upon physical examination, good range of motion was noted. No obvious deformities were observed and the leg was non-tender to touch. The diagnosis was muscle strain and Flexiril was prescribed. Mr. W. was advised to see his personal care physician during R & R if his symptoms persisted.

[5]The record does not contain the pay stub for the first half of December 2005.

On May 2, 2006, Mr. W. was placed on medical leave for return to the United States. Mr. W. had presented at the Kabul Clinic with continued bilateral numbness in his legs since he fell out of his cot and injured his back on March 10, 2006 just prior to returning to the United States on R & R. The Bagrahm Air Field Clinic diagnosed muscle strain, prescribed Flexiril, and advised Mr. W. to see physician during R & R. Subsequently, after his return to Afghanistan, Mr. W. was diagnosed with thoracic cord compression at T-3 and T-5 due to ligamentous hypertrophy. The diagnosing physician recommended corrective surgery before a minor injury caused irreversible damage. Mr. W. returned to Afghanistan without following up with his physician and he "failed to clear though Houston Medical before returning to Theater."

Dr. David Gaskin
(CX 8 and EX 5)

On November 24, 1997, Mr. W. presented to Dr. Gaskin with pain and numbness radiating into his left arm, generally while driving. Physical examination and a treadmill stress did not identify any abnormalities. Dr. Gaskin diagnosed possible radioculopathy.

Dr. Paul Bradley
(CX 9, CX 20, and EX 5)

On March 15, 2006, Dr. Bradley, board certified in internal medicine, assessed Mr. W.'s complaint of bilateral numbness in his feet. Mr. W. reported that the bilateral numbness in the soles of his feet began when he fell out of a bed/cot. Upon physical examination, Dr. Bradley noted some distal deceased response to tactile stimulation. Dr. Bradley diagnosed leg pain and idiopathic peripheral neuropathy. He referred Mr. W. to Dr. Bodziner.

Dr. Richard Bodziner
(CX 10, CX 21, and EX 6)

On March 16, 2006, Dr. Bodziner, board certified in psychiatry and neurology, evaluated Mr. W. for right leg numbness. Mr. W. reported that around March 12, 2006, he fell out of a bunk, about three feet, and hit his right buttock. His entire right leg was numb. Mr. W. returned to bed and upon awakening in the morning, his feet were numb. Mr. W. reported no specific back pain. Dr. Bodziner's physical exam was "essentially normal." Dr. Bodziner commented that Mr. W. presented a "very unusual description of bilateral foot numbness after a minimal fall without specific back trauma." The physician opined Mr. W. might have a "longstanding cervical spondylitic myelopathy and the fall just precipitated some symptoms." Dr. Bodziner recommended diagnostic cervical and thoracic MRIs prior to Mr. W.'s return to Afghanistan. If the results were normal, Dr. Bodziner would "write off the findings on exam as just being normal and longstanding."

On March 29, 2006, Dr. Bodziner reported that the MRIs showed "very significant thoracic cord compression at T-3 and T-5, secondary to ligamentous hypertrophy." Dr. Bodziner advised Mr. W.'s wife that he should make an appointment with a neurosurgeon as soon as possible.

On April 12, 2006, Dr. Bodziner noted that although Mr. W. had made the recommended appointment, it was rescheduled and Mr. W. returned to Afghanistan without seeing a neurosurgeon. Dr. Bodziner advised:

> I am quite concerned by the abnormalities in the patient's scan, and if he were to have any mild trauma to the thoracic spine it could result in irreversible damage to the spinal cord. He definitely needs neurosurgical evaluation, and I think the sooner, the better.

Dr. Thomas F. Decker
(CX 11 and EX 6)

On March 29, 2006, Dr. Decker conducted two MRIs of Mr. W.'s spine. The cervical spine MRI was normal. The thoracic spine MRI showed "prominent hypertrophy of the ligementum flavum at multiple levels" from T-3 to T-7. The spinal canal narrowed at all of these levels, with the most prominent narrowing at T-3 and T-5, which was causing cord compression.

Dr. Khoa Nguyen
(CX 13 and EX 8)

On May 18, 2006, Dr. Nguyen performed a spinal MRI and myelogram. Upon assessment, he diagnosed spinal stenosis. The physician observed significant facet hypertrophy throughout the thoracic spine. Protrusions caused moderate to severe central canal narrowing. The most severe compression was present at T 7-8, with impingement of the right T-7 nerve root.

Dr. Louis G. Horn
(CX 12, CX 14 to CX 16, CX 22, CX 23, EX 7, and EX 8)

On May 15, 2006, Dr. Horn, board certified in neurological surgery, conducted a neurosurgical consultation with Mr. W. Mr. W. "had trouble with numbness and tingling in his feet" and difficulty walking. He has also developed real weakness within the last four to six weeks. Upon physical examination, Dr. Horn noted deceased sensation distally. MRI imaging showed pronounced stenosis at T 3-4 and T 4-5. Dr. Horn concluded Mr. W. was "suffering from gait disturbance and numbness from thoracic spinal stenosis." The neurosurgeon recommended surgical decompression.

Upon inquiry from an insurance adjuster, Dr. Horn responded on June 5, 2006 that Mr. W.'s spinal condition was degenerative. However, "it is possible that a fall, including a fall 3 feet out of a bunk, could have brought on symptoms when they were not present before."

On June 9, 2006, the insurance adjuster further inquired whether Mr. W. had suffered only a temporary aggravation of pre-existing condition, which had resolved, and that the need for surgery pre-existed Mr. W.'s fall out of the bunk. On June 12, 2006, Dr. Horn responded that "whether or not the fall aggravated a degenerative condition" is based on the symptomalogy. By history, Mr. W.'s symptoms were related to his fall. Dr. Horn opined "this minor trauma brought out symptoms that led to the identification of a condition which needed surgery." Since Mr. W.

still had the symptoms, the aggravation had not yet been resolved. At the same time, Dr. Horn noted that if Mr. W.'s fall had not aggravated his condition, "something else would have or it could have come on without any trauma."

After receiving insurance approval in late June 2006, Dr. Horn performed thoracic laminectomy from T-3 through T-8 on July 25, 2006. During the course of the procedure, Dr. Horn observed "severe stenosis with ossification of the ligamental flavum and severe spinal cord compression." Mr. W. was discharged from the hospital five days later.

On September 27, 2006, Dr. Horn noted that Mr. W. was engaged in physical therapy. Most of the post-operative back pain had resolved. Mr. W. reported continued foot numbness. Dr. Horn continued his "off-work" status.

On October 25, 2006, Mr. W. reported less radicular pain and the absence of severe buttocks pain. "He still has lower extremity sensory loss."

By November 6, 2006, Mr. W. was doing "okay." Although he still had sensory loss, Dr. Horn opined "I think he can get back to working as best as he can tolerate it."

In a November 20, 2006 deposition, Dr. Horn reviewed his treatment of Mr. W. Dr. Bodziner referred Mr. W. to Dr. Horn. Dr. Horn does not recall whether he reviewed any of Dr. Bodziner's treatment record. When Dr. Horn first saw Mr. W. on May 15, 2006, Mr. W. indicated that he had bilateral numbness and tingling in his feet and difficulty walking that was not brought on by any particular instigating factor. Upon examination, Dr. Horn noted abnormal reflexes and "decreased sensation distally, in his legs." Upon review of an MRI, Dr. Horn observed stenosis of the spinal canal in several thoracic segments. An additional MRI and myelogram confirmed the problem. Dr. Horn diagnosed thoracic spinal stenosis which was causing his numbness and ambulatory difficulty.

Spinal stenosis is caused by degenerative change in the joints of the spine and degenerative changes and thickening of the ligament that lies underneath the back of the bone. This condition, a posterior disease, compresses the spinal cord. The radiographic studies and physical examination did not provide any evidence of acute or recent trauma. And, based on his treatment notes, no trauma was reported to Dr. Horn.

On July 25, 2006, Dr. Horn performed a laminectomy which involves removing the back part of the bone and the thickened ligament from T-3 to T-8 to take pressure off the spinal cord. By August 30, 2006, although Mr. W. still had numbness in his feet, his gait had improved. By September 27, 2006, Mr. W.'s progress was satisfactory. However, he remained disabled from work. His condition progressed satisfactorily through October 25, 2006. On November 6, 2006, Mr. W. reached maximum medical improvement. At this time, Dr. Horn and Mr. W. discussed his return to work. Dr. Horn advised against any heavy labor, which included not lifting more than 20 pounds. Mr. W. also should not be required to remain in one position, sitting or standing, for long periods of time. The extent of these limitations is based on Mr. W.'s tolerance. Depending on the duration of the trips, Mr. W. may be able to return to truck driving. At the same time, he should not be involved in any type of truck loading.

After reviewing his June 2006 correspondence from the claims adjuster (CX 14 and CX 15), Dr. Horn confirmed that sometimes degenerative changes are not symptomatic and "some type of accident or injury brings them on." Dr. Horn also reaffirmed his June 12, 2006 response.

After reviewing Dr. Gaskin's 1997 treatment notes (CX 8), Dr. Horn indicated that Mr. W.'s thoracic stenosis should not have affected his arm. Radiating arm pain would be caused by a cervical spinal problem.

Considering Mr. W.'s present condition, Dr. Horn would advise him not to return to truck driving that required him to travel over rough terrain and involved bouncing. That type of driving would aggravate his back condition. The purpose of Dr. Horn's recommendation is to preclude worsening of the degenerative condition in the other portions of his spine. His weight lifting and movement restrictions are permanent.

If Mr. W. is still having difficulties, he should be in physical therapy.

Physical Treatment Record
(CX 17, CX 18, and EX 7)

Between September 11 and October 10, 2006, Mr. W. engaged in fourteen sessions of physical therapy. At the close of the therapy, Mr. W. had very little pain in his back. However, bilateral numbness in his feet continued. After Mr. W. stopped making physical therapy appointments, he was formally discharged from physical therapy on November 8, 2006.

Dr. Edward K. Mark, Jr.
(EX 15)

On March 26, 2007, Dr. Mark, a board certified neurosurgeon, evaluated Mr. W.'s back condition. As background, Dr. Mark noted that Mr. W. did not have back or leg problems prior to March 10, 2006 when he fell out of a bunk while working as a driver in Afghanistan. After the fall, he complained about back discomfort and numbness in his feet. Although no traumatic injury was noted, radiographic studies eventually established significant thoracic spinal stenosis. Dr. Mark agreed with Dr. Bodziner's statement that the condition could lead to irreversible spinal cord damage. He also agreed that surgery was necessary "to stop any progression and possibly reverse the signs of myelopathy that were manifest by Mr. [W.]'s condition."[6] In July 2006, Mr. W. underwent surgical decompression of the thoracic segments T-3 to T-7. Post-surgery, Mr. W.'s pain and abnormal gait resolved. However, he still experiences occasional numbness in his feet. Upon physical examination, Dr. Mark concluded that Mr. W.'s symptoms have markedly improved since the thoracic laminectomy. Dr. Mark concurred that Mr. W. had reached maximum medical improvement on November 6, 2006. The physician considered Dr. Horn's work restrictions to be "appropriate and advisable." Although Mr. W. remains capable of working as an over-the-road truck driver, Dr. Mark believed he would not be capable of such work for a significant length of time. He recommended "retraining and re-education for a more sedentary type of work."

[6]Dr. Mark also observed that even in asymptomatic patients, if the condition is discovered, prophylactic surgical intervention may be recommended.

Dr. Mark indicated that Mr. W.'s thoracic spinal stenosis was a pre-existing chronic degenerative condition that was present prior the March 10, 2006 fall. Mr. W.'s earlier radiating arm pain was unrelated to his thoracic condition. Although he found it unlikely, Dr. Mark acknowledged that Mr. W. could have been asymptomatic and his symptoms were brought on as a result of the fall. He noted medical literature contained cases of degenerative conditions which remained asymptomatic for years and then became symptomatic "as a result of what seems to be a relatively minor trauma." According to Dr. Mark, in Mr. W.'s case, "it is possible that the fall brought about symptoms from a pre-existing condition as he manifests." Other than Mr. W.'s presentation, Dr. Mark has no "substantial opinion" about the cause of the onset of Mr. W.'s foot numbness.

Malphrus Employment Records
(CX 24, EX 13, and EX 17)

Mr. W. has a commercial driver's license with tanker and hazardous materials endorsements. For the week of January 1 to January 6, 2007, for 40 hours of work, Mr. W.'s gross pay was $807.28. For the period from January 1, 2007 through May 20, 2007, Mr. W. earned a total of $17,968.

Labor Markey Survey
(EX 12)

On January 4, 2007, Mr. Geoffrey Greenstein prepared a labor market survey for Mr. W. Mr. Greenstein noted that Mr. W. was a college graduate with one year of law school. His work experience included sales, truck driving, warehouse management, and clerking. Mr. Greenstein also recognized Dr. Horn's physical restriction of light duty. With these factors in mind, Mr. Greenstein found the following job opportunities in Savannah, Georgia: transportation sales representative, $30,000 annual base salary; plumbing fixtures sales estimator, 100% commission, estimated annual income $50,000 to $70,000; import/export specialist, $20,000 annual salary; shipping dispatcher, $9.00 an hour; and insurance salesman, 100% commission, estimated annual income $50,000 to $70,000. Mr. Greenstein also indicated that SEI and its parent company had at least four jobs available overseas; however, no salary information was provided.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations of Fact

At the hearing, the parties stipulated to the following facts: On March 10, 2006, an employer-employee relationship existed between the parties. Mr. W. reached maximum medical improvement on November 6, 2006. (TR, p. 7, 8, 13, and 14).

Issue # 1 – Causation

Under the Act, 33 U.S.C. § 902(2), a compensable "injury" is defined as an accidental injury arising out of and in the course of employment. The courts and Benefits Review Board

("BRB" or "Board") have provided substance and boundaries to this definition through numerous interpretations.

First, injury means some physical harm in that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F. 2d 152 (2d Cir. 1991). Credible complaints of subjective symptoms and pain may be sufficient to establish such physical harm. *Hampton v. Bethlehem Steel Corp.,* 24 BRBS 141 (1990); *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981).

Second, a work-related aggravation of a pre-existing condition is an injury under the Act. *Preziosi v. Controlled Indus.*, 22 BRBS 468 (1989). To be a compensable injury under the Act, the employment-related injury need not be the sole cause, or primary factor, in a disability. If an employment-related injury contributes to, combines with, or aggravates a pre-existing or underlying condition, the entire disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513 (5th Cir. 1986); *Kooley v. Marine Indus. N. W.*, 22 BRBS 142 (1989). Thus, the term "injury" includes aggravation of a pre-existing, non-work-related condition or the combination of work- and non-work-related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990).

Third, under the "aggravation rule," the relative contribution of the accident and prior disease are not weighed. *Independent Stevedore Co. v. O'Leary,* 357 F.2d 812, 815 (9th Cir. 1966). The aggravation rule or doctrine does not require that the employment injury interact with the underlying condition itself to produce some worsening of the underlying condition. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1991). If an employee is incapacitated from earning wages by an employment injury which accelerates a condition which would ultimately have become incapacitating in any event, the employee is nevertheless considered to be incapacitated by the employment injury and the resulting disability is compensable under the Act. *Id.* Although an injury may not be the medical cause of the pre-existing non-work-related condition, if the injury brings on symptoms earlier than would be expected, the injury is considered the proximate cause. *Id.* (citing a determination by the Arizona Supreme Court). To hasten disability is to cause it. *Id.* at 814-15.

Fourth, to establish a *prima facie* claim for compensation, a claimant must establish: a) the claimant sustained a physical harm or pain, and 2) an accident occurred during the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984).

If a claimant establishes the existence of an injury, as defined by the Act, and the occurrence of a work-related accident that could have caused the injury, the courts and BRB have interpreted Section 20(a) of the Act, 33 U.S.C. § 920(a), to invoke a presumption on behalf of a claimant that, absent substantial evidence to the contrary, the injury was caused by the work-related accident. To rebut the Section 20(a) causation presumption, the employer must present specific medical evidence proving the absence of, or severing, the connection between the bodily harm and the employee's working condition. *Parsons Corp. v. Director, OWCP (Gunter)*, 619 F.2d 38 (9th Cir. 1980). Mere hypothetical probabilities or suggested alternate ways an injury may have occurred are not sufficient. *Smith v. Sealand Terminal*, 14 BRBS 844 (1982); *Williams v. Chevron*, U.S.A., 12 BRBS 95 (1980). If the Section 20(a) presumption is rebutted,

it no longer controls the adjudication. *Swinton v. J. Frank Kelly, Inc*., 554 F.2d 1075 (D.C. Cir.), *cert. denied,* 429 U.S. 820 (1976). Instead, all the evidence in the record must be weighed and the causation determination is based on the preponderance of the evidence. *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986).

Injury

With these principles in mind, I first turn to the determination of whether Mr. W. has an injury. During this consideration, no presumption exits.[7] Instead, Mr. W. must prove the existence of some bodily malfunction or harm through the preponderance of the evidence.

Based Mr. W.'s credible testimony,[8] Dr. Bradley's March 15, 2006 specific physical examination observation, and the preponderance of the medical opinions, I find Mr. W. has an injury to the extent that he lost sensation in his feet. Mr. W. credibly described the condition as numbness in both feet and Dr. Bradley noted deceased distal response to tactile stimulation. Although Dr. Bodziner's examination the next day was essentially normal and he considered the presentation unusual, once the physician became aware of the MRI report of thoracic spinal stenosis, the physician no longer wrote off the examination as normal. Likewise, none of the physicians who treated or evaluated Mr. W.'s condition and were aware of the radiographic evidence of thoracic spinal cord compression raised any question about the loss of sensation Mr. W. was experiencing in his feet.

Work-Related Accident

Again, based on his credible testimony, I find Mr. W. fell out of a cot while sleeping in the early morning hours of March 10, 2006 at Bagrahm Air Field, Afghanistan. Although the March 10, 2006 base clinic treatment notes do not support his testimony that he told the medics about the incident, within five days of the fall, on March 15, 2006, and well before the extent of Mr. W.'s spinal problem became known, Dr. Bradley documented Mr. W.'s statement to him that his foot numbness developed the morning he fell out of the cot on March 10, 2006. The next day, March 16, 2007, Dr. Bodziner likewise chronicled Mr. W.'s report of rolling out of a cot.

When Mr. W. fell out of his cot on March 10, 2006, he was employed as a truck driver by SEI which had a government contract in support of U.S. Army operations in Afghanistan. As a result, his claim falls under the disability compensation program established by the Defense Base Act, 42 U.S.C. § 1651. Under the Defense Base Act, an accident may be work-related even if it did not occur within the space and time boundaries of work, if the employee was in a "zone of special danger." *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 505 (1951). Since Mr. W. was awaiting transportation in the employer's facilities at Bagrahm Air Field in Afghanistan, within

[7]*See Devine v. Atlantic Container Lines, G.I.E,* 25 BRBS 15 (1990).

[8]I render my credibility determination based on Mr. W.'s hearing demeanor, straightforward testimony, and apparent candor.

the Army's area of operations, I find he was in a zone of special danger at the time of his accident, which renders his fall out of the cot a work-related accident.[9]

Section 20(a) Presumption

Since Mr. W. has demonstrated the presence of an injury and a work-related accident, I must next determine whether the March 10, 2006 accident at Bagrahm Air Field could have caused such an injury. In that regard, again based on Mr. W.'s credible description of the circumstances and nature of his fall, landing on his right leg and buttocks and considering the development of foot numbness within a couple hours of that fall, I find that the accident could have caused his injury.

Based on my determination that Mr. W.'s March 10, 2006 work-related accident could have caused his foot numbness, which represented the development of a symptom associated with his pre-existing thoracic spinal stenosis, Mr. W. is able to invoke the Section 20(a) presumption that his injury and corresponding aggravation of a previously asymptomatic pre-existing, non-work-related degenerative back condition arose out of and during the course of his employment.

Substantial Contrary Evidence

The potential contrary evidence on the issue of causation submitted by SEI falls well short of the "substantial" threshold. According to Dr. Mark, it was unlikely that Mr. W. developed numbness in his feet and that his degenerative spinal condition became symptomatic due to his fall from a cot on March 10, 2006. However, Dr. Mark also noted medical literature indicating an asymptomatic degeneration condition can become symptomatic due to a relatively minor trauma. Consequently, Dr. Mark acknowledged it was possible that Mr. W.'s fall brought on the symptoms of his pre-existing condition. In light that acknowledgement, Dr. Mark's probability assessment that it was unlikely the fall caused the symptoms is not substantial contrary evidence. As a result, the Section 20(a) presumption is not rebutted. Accordingly, Mr. W. has established that his injury, which represented the initiation of symptoms due to his thoracic spinal stenosis/spinal cord compression, and a corresponding aggravation of a pre-existing, non-work-related degenerative condition, arose out of and during the course of his employment.[10]

Issue # 2 – Nature and Extent of Disability

As noted above, because the March 10, 2006 work-related accident caused Mr. W.'s pre-existing back condition to become symptomatic and represented an acceleration of his condition and aggravation of his back problems, the Employer is liable for the entire disability associated

[9]*See Ford Aerospace & Communications Corp. v. Boling*, 684 F.2d 649 (9th Cir. 1982) (a heart attack suffered by a claimant while off duty in the barracks provided by the employer was in the zone of special danger).

[10]Since the Section 20(a) causation presumption is not rebutted, I need not dwell on a more detail causation determination. However, I note that Dr. Horn's definitive determination that Mr. W.'s minor trauma brought out the symptoms is more probative on the causation issue than Dr. Mark's speculative assessment that the fall was an unlikely cause of Mr. W.'s foot numbness.

with Mr. W.'s aggravated thoracic spinal stenosis and spinal cord compression. Such disability is measured in terms of economic loss, or an inability to work. Under the Act, a claimant's inability to work due to a work-related injury is addressed in terms of the extent of the disability (total or partial) and the nature of the disability (permanent or temporary). In a claim for disability compensation, the claimant has the burden of proving, through the preponderance of the evidence, both the nature and extent of disability. *Trask v. Lockheed Shipbuilding & Constr*. Co., 17 BRBS 56, 59 (1985).

Nature

The nature (or character) of a disability may be either temporary or permanent. Although the consequences of a work related injury may require long term medical treatment, an injured employee reaches maximum medical improvement ("MMI") when his condition has stabilized. *Cherry v. Newport News Shipbuilding & Dry Dock Co*., 8 BRBS 857 (1978). In other words, the nature of the worker's injured condition becomes permanent and the worker has reached maximum medical improvement when the individual has received the maximum benefit of medical treatment such that his condition will not improve. *Trask*, 17 BRBS at 60. Any disability suffered by a claimant prior to MMI is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984). If a claimant has any residual disability after reaching MMI, then the nature of the disability is permanent.

Based on the parties' stipulation of fact and the consensus of Dr. Horn and Dr. Mark, I find Mr. W. reached MMI on November 6, 2006. On that date, the nature of his impairment changed from temporary to permanent.

Extent

The question of the extent (or quality) of a disability, total or partial, is an economic as well as a medical concept. *Rinaldi v. General Dynamics Corp*., 25 BRBS 128, 131 (1991). The Act defines disability as an incapacity, due to an injury, to earn wages which the employee was receiving at the time of injury in the same or other employment. *McBride v. Eastman Kodak Co*., 844 F.2d 797 (D.C. Cir. 1988). Total disability occurs if a claimant is not able to adequately return to his or her pre-injury, regular, full-time employment. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co*., 16 BRBS 190, 194 (1984). A disability compensation award requires a causal connection between the claimant's physical injury and his or her inability to obtain work. The claimant must show an economic loss coupled with a physical and/or psychological impairment. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Under this standard, a claimant may be found to have either suffered no loss, a partial loss, or a total loss of wage-earning capacity. Additionally, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, as previously discussed, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachen Shipping v. Nash*, 782 F.2d 531 (5th Cir. 1986).

The determination of the extent of Mr. W.'s disability, which occurred as a result of the March 10, 2006 aggravation of an underlying degenerative thoracic spinal condition, starts with

a showing that he was not able to return to his regular or usual employment due to the work-related injury. *SEACO and Signal Mutual Indemnity Assoc., Ltd. v. Bess*, 120 F.3d 262 (4th Cir. 1997) (unpub.); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988). Although he experienced persistent numbness in his feet after the March 10, 2006 injury, Mr. W. was able to continue driving a truck in Afghanistan until Dr. Decker's MRI and Dr. Bodziner's assessment concerning the necessity for an immediate neurological consult came to the attention of Mr. W. and the Employer at the end of April 2006. However, in light of the seriousness of Mr. W.'s back condition which had become symptomatic after his March 10, 2006 fall, SEI placed Mr. W. on medical leave at the beginning of May 2006. Consequently, as of May 1, 2006, the extent of Mr. W.'s disability became total. Over the course of the next several months, due to surgery, physical therapy, and rehabilitation, Mr. W. remained unable to perform any type of work. Further, due to the post-recovery work restrictions imposed by Dr. Horn, which Dr. Mark also found reasonable, and in light of the physical requirements associated with Mr. W.'s truck driving job in Afghanistan, I find Mr. W. is unable to return to his regular pre-injury employment of a truck driver in Afghanistan following his back surgery.

The next adjudication step in assessing extent of disability involves either a showing of suitable alternative employment by the Employer or the return of a claimant to the workforce. *See Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986). Since Mr. W. returned to work as truck driver for Malphrus before the Employer presented the January 2007 labor market survey,[11] the pivotal date regarding extent of disability is December 21, 2006.[12] When Mr. W. returned to the workforce as a truck driver for Malphrus on December 21, 2006, he no longer suffered a total loss of earning capacity. Instead, at the moment of his re-employment, the extent of Mr. W.'s permanent disability, based on his resumed wage-earning capacity, changed from total to partial.

Summary

Based on the above determinations, I find Mr. W. is entitled to the following types of disability compensation under the Act:

May 1, 2006 to November 5, 2006 – temporary, total disability under Section 8(b).

November 6, 2006 to December 20, 2006 – permanent, total disability under Section 8(a).

December 21, 2006 and continuing – permanent, partial disability under Section 8(c).

[11]Although the labor market survey post-dated Mr. W.'s return to employment, it remains potentially relevant on the issue of Mr. W.'s residual earning capacity.

[12]Although Mr. W. only attended a training and did not actually start driving a truck for Malphrus until the beginning of January 2007, he nevertheless reported first reported to Malphrus as an employee on December 21, 2006. Thus, the training day triggered the change in the extent of disability in terms of being able to earn an income.

Issue # 3 – Average Weekly Wage and Post-Injury Wage-Earning Capacity

Having found the various types of disability compensation, and in order to establish the specific amount of disability compensation under the provisions of Section 8 of the Act, I next must determine a) the average weekly wage at the time of Mr. W.'s March 10, 2006 injury, and b) Mr. W's wage-earning capacity once he returned to the work force on December 21, 2006.

Average Weekly Wage

Section 10 of the Act, 33 U.S.C. § 910, sets out three alternative methods for determining average weekly wage. Section 10(a) applies if the claimant worked in similar employment on either a five or six day a week schedule for a full year prior to his injury.[13] In situations were the claimant is injured before completing a full year in his job, Section 10(b) is used. Section 10(c) is the catch-all provision which is utilized in cases where Sections 10(a) and (b) are inapplicable.

Section 10(c), specifically states in part:

> such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee. . . shall reasonably represent the annual earning capacity of the employee.

Since Mr. W. worked nearly two and half years as a truck driver in Afghanistan, Section 10(b) does not apply. Similarly, although he had worked regularly as a truck driver in Afghanistan in the year prior to his injury, Mr. W. worked seven days a week, rather than five or six days. As a result, Section 10(a) is inapplicable. *See Zimmerman v. Service Employers International, Inc.,* BRB No. 05-0580 (Feb. 21, 2006) (unpub.) Consequently, the appropriate provision for determining Mr. W.'s pre-injury average weekly wage is Section 10(c). *See Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176 (9th Cir. 1976), *aff'g and remanding in part*, 1 BRBS 159 (1974).

According to the BRB, the purpose of Section 10(c) "is to arrive at a sum which reasonably represents the claimant's annual earnings at the time of his injury." *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). I must make a fair and accurate assessment of Mr. W.'s earnings capacity – the amount he would have had the potential and opportunity of earning absent his March 10, 2006 injury. *Jackson v. Potomac Tempories, Inc.,* 12 BRBS 410, 413 (1980); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 757 (7th Cir. 1979). While I have considerable discretion, my determination must be based on substantial evidence in the record. *Matthews v. Mid-States Stevedoring, Corp*., 11 BRBS 509, 513 (1979).

[13]Under Section 10(a), for a 5 day a week worker, the average daily wage is multiplied by 260 and divided by 52 to obtain the average weekly wage. For a 6 day a week worker, the multiplication figure is 300.

An employee's salary at the time of the injury may be an appropriate reflection of earning capacity. *Hayes v. P & M Crane Co*., 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991). Other factors to be considered include:

1. All "of the employee's relevant work experience." *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991);

2. Earning figures "higher than that which was previously enjoyed by the claimant." *Harrison v. Todd Pacific Shipyards, Co*., 21 BRBS 339, 345 (1988);

3. Other income, if the injury precludes not only the work engaged in at the time of the injury but also other previous employment that generated significant income (for example, in *Wise v. Horace Allen Excavating, Co*., 7 BRBS 1052, 1057 (1978), the Board held in a longshore case that calculation of an average weekly wage should include income from non-maritime employment when the claimant had significant income from a contracting business because the claimant's wage earning capacity was diminished in all income-producing activities due to his work related injury); and,

4. Overtime, if a regular and normal part of the claimant's employment, *Bury v. Joseph Smith and Sons*, 13 BRBS 694, 698 (1981).

Since Mr. W.'s work in the Afghanistan war zone was completely unlike his truck driving experience in the United States, Claimant's counsel asserts that using pre-deployment wages is not appropriate. Counsel also notes that in other cases the BRB affirmed an average weekly wage determination based on similar reasoning. Consequently, since Mr. W. earned a total of $78,636 in the twelve monthly pay periods before he left Afghanistan, the applicable average weekly wage under Section 10(c) is $1,512.24.

After noting the diverse decisions by administrative law judges on this specific issue, Employer's counsel maintains that consideration of two factors leads to a much lower average weekly wage. First, by its very nature, wartime employment is temporary in nature. Mr. W.'s contract specifically indicated that its duration was 12 months and that no minimum duration of his work as a truck driver in Afghanistan was guaranteed. Second, since Mr. W. worked seven days a week and received significant enhancements to his base pay due his work in a war zone, Mr. W.'s average weekly wage while employed by SEI was "uncharacteristically and extraordinarily high" and represented a temporary spike in his wage earning capacity. Due to these two considerations, Employer's counsel believes a blending of Mr. W.'s pre-deployment earning capacity with his wages in Afghanistan produces a more appropriate average weekly wage. Under this approach, if Mr. W.'s earnings over the course of five years, from January 1, 2001 through December 31, 2005, are blended, the average weekly wage is $652.49, based on an average annual income of $33,929.60. An alternative approach blends two years of pre-deployment income from 2002 and 2004 with Mr. W.'s earnings in 2004 and 2005 from Afghanistan and yields an average weekly wage of $759.00 based on an average annual income of $39,469.63.

Upon consideration of the parties' positions, I first reject the blended approach advocated by the Employer to determine average weekly wage. Mr. W.'s December 2003 SEI employment contract indicated that his work in Afghanistan would last only 12 months and could be terminated at any time. However, in actuality, when Mr. W. rolled out of his cot on March 10, 2006 and aggravated his back condition, he had served more than two years in Afghanistan and there appeared to be no foreseeable limit to the duration of his work in that country. In other words, when Mr. W. started driving a POL truck in Afghanistan in the beginning of 2004, his new average weekly wage as a truck driver may have been considered to be uncharacteristically high and temporary in nature. However, by March 2006, Mr. W.'s weekly earnings in Afghanistan had surely become his customary and regular wages. I also note that while my administrative law judge colleagues have reached different conclusions on applying a blended approach to determine a war zone average weekly wage, the BRB, albeit for various reasons, has affirmed average week wage determinations based solely on a claimant's war zone average weekly wage.[14]

I also will not apply the method urged by the Claimant. Due to the sight variations in his yearly income in Afghanistan, I will not limit determination of Mr. W's average weekly wage to the twelve pay periods prior to his termination of work in Afghanistan on May 1, 2006. Instead, I believe a more accurate average weekly wage for Mr. W.'s work in Afghanistan is obtained by considering all his income there. As a result, I will use Mr. W.'s 2004 income of $75,245, 2005 income of $73,214, and 2006 income of $31,886 (for 17 weeks). Based on those earnings, I find Mr. W.'s average weekly wages is $1,490, determined as follows: a) $75,245 + $73,214 + $31,886 = $180,345; b) 52 weeks + 52 weeks + 17 weeks = 121 weeks; and, c) $180,345/121 weeks = $1,490.

Post-Injury Wage-Earning Capacity

If Mr. W. has suffered any definitive loss of wage-earning capacity due to his permanent disability associated with his March 10, 2007 injury, he may be entitled to compensation for permanent partial disability under Section 8(c). To render that determination, I must establish his present weekly wage earning capacity.

Based on his first week of employment with Malphrus in January 2007, Mr. W. asserts his present weekly wage earning capacity is $808.00.

Relying on the labor market survey showing several high paying jobs, the Employer maintains that Mr. W. has not suffered any loss of wage-earning capacity due to his March 10, 2007 injury. Additionally, considering the additional Malphrus payroll summary, and excluding the three pay periods when Mr. W. was away from work due to the present litigation and associated medical evaluations, and considering his usual amount of overtime, Mr. W.'s present weekly earning capacity averages $1,060.00.

Upon consideration of the labor market survey, I first note that the potential overseas jobs provide little information on this issue since the vacancy announcements do not include any

[14] *Proffitt v. Service Employer Int'l,* 40 BRBS 41 (2006); *Patton v. Brown & Root Svcs.,* BRB No. 06-0401 (Nov. 28, 2006) (unpub.); *Zimmerman v. Service Employers Int'l, Inc.*, BRB No. 05-580 (Feb. 21, 2006) (unpub.).

salary information. Similarly, the 100% commissioned jobs are not particularly relevant since the estimated annual income is speculative. The remaining three jobs of transportation sales representative, import specialist, and shipping dispatcher offered an annual income from $20,000 to $30,000 or $9.00 an hour. However, Mr. W. is presenting earning $16 an hour with Malphrus and his weekly wages produce an income much greater than $30,000. As a result, contrary to the Employer's assertion, the labor market survey does not support a finding that Mr. W. has suffered no loss of wage-earning capacity.

Although Mr. W. earned only $808 during his first week with Malphrus, the additional payroll information shows that his earnings increased with a rise in his overtime hours. I agree with the Employer's observation that Mr. W.'s lower earnings for the pay periods, ending January 28, 2007 (hearing conducted January 25, 2007), February 25, 2007 (first appointment with Dr. Mark on February 19, 2007) and April 1, 2007 (second appointment with Dr. Mark on March 26, 2007) are not indicative of Mr. W.'s usual work week. Due to the present litigation and associated medical examinations, Mr. W. was unavailable for portions of those weeks. After removing those three pay periods, Mr. W. earned a total of $15,684 during the remaining 16 pay periods, which yields an average weekly wage of approximately $980. Accordingly, I find Mr. W.'s residual weekly wage-earning capacity is $980.00.

Issue # 4 – Disability Compensation

Having determined various types of disability compensation for Mr. W. and the applicable average weekly wages, I take the final step of assessing the compensation awards for Mr. W.'s temporary total, permanent total, and permanent partial disability.

Temporary Total Disability Compensation

Under Section 8(b), 33 U.S.C. § 908(b), an injured employee receives 2/3 of his pre-injury average weekly wage during the continuance of the disability. Accordingly, Mr. W. is entitled to 2/3 of his pre-injury average weekly wage of $1,490.00 from May 1, 2006 through November 5, 2006.

Permanent Total Disability Compensation

Under Section 8(a), 33 U.S.C. § 908(a), an injured employee receives 2/3 of his pre-injury average weekly wage during the continuance of the disability. Accordingly, Mr. W. is entitled to 2/3 of his pre-injury average weekly wage of $1,490.00, from November 6, through December 20, 2006.

Permanent Partial Disability Compensation

For permanent partial disability compensation, Section 8(c), 33 U.S.C. § 908(c), sets out a schedule of compensation for numerous specific physical impairments or losses. However, Mr. W.'s back injury is not one of the scheduled injuries. Instead, compensation for his permanent partial disability involving his back is determined by Section 8(c)(21). Section 8(c)(21) bases permanent partial disability compensation on two-thirds the difference between the pre-injury

average weekly wage and the employee's wage-earning capacity thereafter in the same or another employment. The determination of wage-earning capacity used in the Section 8(c)(21) calculation is defined by Section 8(h). Any compensation is payable during continuance of the partial disability.

Section 8(h) specifies that the wage-earning capacity of an injured employee under Section 8(c)(21) is determined by his actual post-injury earnings, if those earnings reasonably and fairly represent his wage-earning capacity, or a reasonable wage earning capacity based on the nature of the injury, usual employment, and other factors.[15]

As previously determined, Mr. W.'s actual post-injury earning capacity is $980 a week. Consequently, under Section 8(c)(21), Mr. W. is entitled to receive 2/3 the difference between his pre-injury average weekly wage of $1,490.00 and his present residual weekly earning capacity of $980.00, from December 21, 2006, and continuing.

Medical Treatment

According to Section 7(a) of the Act, 33 U.S.C. § 907(a), an employer shall furnish all reasonable and necessary medical care and other attendant care or treatment, hospitalization, and medication for a work-related injury. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). The term "necessary" relates to whether the medical care is appropriate for the injury. The term "reasonable" addresses the actual cost of treatment. *See Pernell*, 11 BRBS at 539; *see* 20 C.F.R. § 702.402.

Although not a principal issue in this case, Mr. W. may have unpaid medical bills and require subsequent physical therapy. Accordingly, absent any objection as to the reasonableness and necessity of Mr. W.'s medical treatment through his date of maximum medical improvement of November 6, 2006, I find the Employer, SEI, is responsible for the costs of Mr. W.'s medical treatment associated with Mr. W.'s back injury during that period. Additionally, from November 6, 2007 and continuing, SEI shall provide Mr. W. all reasonable and necessary medical care associated with his March 10, 2007 injury and subsequent back surgery.

ATTORNEY FEE

Section 28 of the Act, 33 U.S.C. § 928, permits the recoupment of a claimant's attorney's fees and costs in the event of a "successful prosecution." Since I have determined an issue in favor of Mr. W., his counsel is entitled to submit a petition to recoup fees and costs associated with his professional work before the Office of Administrative Law Judges within 30 days of receipt of this Decision and Order. Employer's counsel has 30 days from receipt of such attorney fee petition to respond.

[15]The BRB indicates the post-injury wage-earning capacity must be adjusted to the wage levels which the job paid at the time of the injury. *See Walker v. Washington Metro Area Transit Authority*, 793 F.2d 319, 321 n.2 and 323 n. 5 (DC Cir. 1986); *Bethard v. Sun Shipbuilding & Dry Dock Co*. 12 BRBS 691, 695 (1980). However, since Mr. W. was only out of work for seven months in 2006, I do not believe an adjustment based on National Average Weekly Wage is necessary. *See Richardson v. General Dynamics Corp*., 23 BRBS 327 (1996).

ORDER

Based on my findings of fact, conclusions of law, and the entire record, I issue the following order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

1. The Employer, SERVICE EMPLOYEES INTERNATIONAL, INC., shall pay the Claimant, MR. L.W., JR., compensation for **TEMPORARY TOTAL DISABILITY**, due to his injury on March 10, 2006, from May 1, 2006 through November 5, 2006, based on an average weekly wage of $1,490.00, such compensation to be computed in accordance with Section 8(b) of the Act, 33 U.S.C. § 908(b).

2. The Employer, SERVICE EMPLOYEES INTERNATIONAL, INC., shall pay the Claimant, MR. L.W., JR., compensation for **PERMANENT TOTAL DISABILITY**, due to his injury on March 10, 2006, from November 6, 2006 through December 20, 2006, based on an average weekly wage of $1,490.00, such compensation to be computed in accordance with Section 8(a) of the Act, 33 U.S.C. § 908(a).

3. The Employer, SERVICE EMPLOYEES INTERNATIONAL, INC., shall pay the Claimant, MR. L.W., JR., compensation for **PERMANENT PARTIAL DISABILITY**, due to his injury on March 10, 2006, from December 21, 2006, and continuing, based on the difference between his pre-injury average weekly wage of $1,490.00 and his post-injury, weekly wage-earning capacity of $980.00, such compensation to be computed in accordance with Section 8(c)(21) of the Act, 33 U.S.C. § 908(c)(21).

4. The Employer, SERVICE EMPLOYEES INTERNATIONAL, INC., shall receive credit for all amounts of compensation previously paid to the Claimant, MR. L.W., JR., as a result of his injury on March 10, 2006.

5. Following the credit offset, the Employer, SERVICE EMPLOYEES INTERNATIONAL, INC., shall pay interest on each remaining unpaid installment of compensation from the date the compensation became due at the rates specified in 28 U.S.C. § 1961.

6. The Employer, SERVICE EMPLOYEES INTERNATIONAL, INC., shall furnish the claimant, MR. L.W., JR., medical treatment, past, present, and future, as required by his March 10, 2006 injury, and subsequent surgery, in accordance with Section 7(a) of the Act, 33 U.S.C. § 907(a).

SO ORDERED:

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RICHARD T. STANSELL-GAMM
Administrative Law Judge

June 1, 2007
Washington, D.C.